N^{o}. 50238-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

MICHAEL PRESTON, Jr.,
Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the Superior Court of Thurston County,
Cause No. 15-1-00433-0
The Honorable Chris Lanese, Presiding Judge

Reed Speir
WSBA No. 36270
Attorney for Appellant
3800 Bridgeport Way W., Ste. A #23
(253) 722-9767

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

A. ARGUMENT

1. The State continues to rely on the incorrect definition of "lost" property and fails to acknowledge its true burden when prosecuting a charge of second-degree theft by appropriation of lost property.

As pointed out on pages 8-9 of Mr. Preston's Opening Brief, the State charged Mr. Preston with second-degree theft by appropriation of lost property of another with the intent to deprive him or her of that property under RCW 9A.56.040(1)(a) and RCW 9A.56.020(1)(c).

Throughout its Response Brief, the State relies on the same colloquial definition of "lost property" that it relied on at Mr. Preston's trial, i.e. that "lost property" is property one comes across and that one does not know the owner of. The State ignores the definition of "appropriate lost or misdelivered property" contained in RCW 9A.56.010(2) and the distinctions between "lost property," "abandoned property," and "mislaid property" recognized at common-law and adopted by Washington Courts.[1]

The version of RCW 9A.56.010(2) in effect in 2015 defined "appropriate lost or misdelivered property" as "obtaining or exerting control over the property...of another which the actor **knows** to have been

[1] *State v. Kealey*, 80 Wn. App. 162, 171, 907 P.2d 319 (1995), *review denied* 129 Wn.2d 1021 (1996), as amended on denial of reconsideration (Feb. 26, 1996) (internal citations omitted), *citing* 1 Am.Jur.2d Abandoned, Lost, and Unclaimed Property §§ 4, 6, 11-13 (Rev. ed. 1994).

lost or mislaid." Emphasis added. Under Washington law, property is "lost" when the owner has "parted with possession unwittingly and no longer knows its location" and property is "mislaid" when the owner "intentionally puts it in a particular place, then forgets and leaves it."[2] Accordingly, the State's true burden in prosecuting Mr. Preston was to prove beyond a reasonable doubt that he picked up the ring knowing that knew the owner of the ring had either "parted with possession of the ring unwittingly and no longer knew its location" or "intentionally put the ring it in a particular place, then forgot and left it."

In arguing the State met its burden to convict Mr. Preston of second-degree theft, the State ignores the knowledge requirement of RCW 9A.56.010(2) and ignores *Kealey*'s clarification of the definition of "lost" property. The State effectively ignores the legal definition of "theft" as applies to these circumstances under Washington law and, instead, relies on the colloquial understand of "lost" to argue it met its burden.[3] The State's argument fails. The State presented no evidence that Mr. Preston knew at the time he picked up the ring that Ms. Amacker had parted with possession of the ring unknowingly and no longer knew its location. Therefore, the State presented insufficient evidence to convict Mr. Preston of theft.

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[2] *Kealey*, 80 Wn. App. at 171, 907 P.2d 319
[3] State's Response p. 10-12.

2. The incomplete and missing jury instructions are properly addressed on appeal because the instructions relieved the State of its burden and failed to define the essential elements of the crimes charged.

As discussed at pages 14-21 in Mr. Preston's Opening Brief, the jury instructions failed to fully define "lost property" as that term is defined under Washington law, and the failure to fully define this term resulted in the jury not being instructed on all essential elements of the crime and having to guess at the meaning of that essential element. The incomplete instructions also relieved the State of its burden to prove that Mr. Preston acted with knowledge of the status of the ring sufficient to support a conviction for theft based on appropriation of "lost" property.

As pointed out in Mr. Preston's Opening Brief, "the omission of an element of a charged crime is a manifest error affecting a constitutional right that can be considered for the first time on appeal."[4] Also, a defendant does not receive a fair trial if "the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved."[5]

The jury instruction errors in this case are manifest errors affecting Mr. Preston's constitutional rights. As such, they can be considered for the first time on appeal.

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[4] *State v. Richie*, 191 Wn. App. 916, 927, 365 P.3d 770 (2015).
[5] *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

3. The error in failing to properly define "lost property" was not harmless since it relieved the State of its burden of proving Mr. Preston took the ring with knowledge the owner of the ring had parted with possession unwittingly and no longer knew its location.

Again, as pointed out in Mr. Preston's Opening Brief, the absence of the proper legal definition of "lost" property relieved the State of its burden to prove Mr. Preston took the ring with knowledge that the ring was "lost" because the jury was never informed that there was a specific legal test that must be satisfied before a piece of property can be classified as "lost" property for purposes of a theft or trafficking in stolen property charge. Had the jury been properly informed that the State had to prove Mr. Preston knew Ms. Amacker had unwittingly lost the ring and no longer knew its location, the jury would have found Mr. Preston not guilty because the State failed to present any evidence indicating that Mr. Preston knew anything about Ms. Amacker or any other potential owner of the ring. The lack of a jury instruction informing the jury of the correct legal test of Mr. Preston's knowledge of the ring was critical to the State's case because the State relied on the colloquial understanding of the term "lost" to argue it had met its burden of proving that Mr. Preston knew the ring was "lost" because "any reasonable person" would "know that in the same situation."

The error in failing to give additional jury instructions properly

defining "lost" property under Washington law was not harmless.

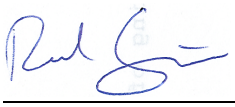
B. CONCLUSION

The State's arguments are premised on its incorrect representation of its burden when it charges someone with the crime of theft by misappropriation of lost property. The State refuses to acknowledge the settled law that "lost property" has a specific legal definition more stringent than the colloquial understanding of the term and that the State's burden includes proving that the defendant took the property with knowledge the property was "lost" as defined under Washington law.

For the reasons stated above and in Mr. Preston's Opening Brief, this court should vacate Mr. Preston's convictions and either remand his case for dismissal of the charges with prejudice or for a new trial.

DATED this 27th day of September, 2017.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 27th day of September, 2017, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Thurston County Prosecuting Attorney's Office
2000 Lakeridge Dr. SW, Building 2
Olympia, WA 98502

And to:

Mr. Michael Ray Preston
2000 Lakeridge Drive SW
Olympia, WA 98502

Signed at Tacoma, Washington this 27th day of September, 2017.

Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

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